90-39

Supreme Court, U.S.
FILED
JUN 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

RICHARD C. FRAZIER,
Petitioner

v.

THE STATE OF OHIO
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO AND THE COURT OF APPEALS FOR THE NINTH JUDICIAL DISTRICT MEDINA COUNTY, OHIO

MARCO & MARCO, L.P.C.
RICHARD J. MARCO
ATTORNEY FOR PETITIONER
OHIO ATTORNEY NO. 0015118
52 PUBLIC SQUARE
MEDINA, OHIO 44256
(216) 725-0030

QUESTIONS PRESENTED FOR REVIEW

Whether a state court may, consistent with the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, compel a defendant in a criminal proceeding to submit to a blood test designed for DNA testing procedures when the trial court has no evidence before it to find that the DNA testing procedures will result in the finding of evidence relevant to the guilt or innocence of the accused or that the procedures to be employed are able to produce the proffered effect.

PARTIES

The parties to the proceedings are set forth as follows:

Richard C. Frazier

and

the State of Ohio.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES AND CASES CITED iv

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES 2

STATEMENT OF THE CASE AND FACTS 6

STAGE IN THE PROCEEDINGS WHERE THE FEDERAL QUESTIONS WERE RAISED 9

ARGUMENT 9

INTRODUCTION 9

FOURTH AMENDMENT ARGUMENT 10

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES:

WINSTON v. LEE,
470 U.S. 753, 105 S.Ct. 1611, 84 L.Ed. 2d 662 (1985) 10

SCHMERBER v. CALIFORNIA,
384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed. 908 (1966)..... 12

CONSTITUTIONS AND STATUES:

Fourth Amendment to the Constitution of the United States 3

Fifth Amendement to the Constitution of the United States 3

Fourteenth Amendment to the Constitution of the United States 4

Ohio Revised Code Section 2907.02 (A) (1) (b) 4

Ohio Revised Code Section 2907.02 (A) (2) 4

Ohio Revised Code Section 2907.05 (A) (3) 5

Ohio Revised Code Section 2907.03 (A) (5) 6

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

RICHARD C. FRAZIER,
Petitioners

THE STATE OF OHIO
Respondent

Petition For a Writ of Certiorari
to the Supreme Court of Ohio and
The Court of Appeals For The
Ninth Judicial District
Medina, County, Ohio

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinions of the Court of Appeals for the Ninth Judicial

District, Medina County, Ohio, are unreported and are appended hereto, marked as Appendix "C" and "D". The Judgment Entry of the Ohio State Supreme Court denying petitioner's motion to certify the record is also unpublished and is appended hereto, marked as Appendix "B".

JURISDICTION

The Judgment of the Supreme Court of the State of Ohio was entered on March 18, 1990. The Notice of Appeal to this Honorable Court was filed on the 29th day of May, 1990. Said Notice of Appeal was timely filed. Jurisdiction of this matter is claimed under 28 United States Code Section 1257, subsection (3).

CONSTITUTIONAL PROVISIONS AND STATUTE

The instant petition involves review and interpretation of the following constitutional provisions. The Ohio Statutes included herein are informational insofar as they are the crimes with which petitioner has been charged and are provided for herein for informa-

tional purposes.

FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue,but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or

property, without due process of law, nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

OHIO REVISED CODE SECTION 2907.02(A)(1)(b)

No person shall engage in sexual conduct with another who is not the spouse of the offender but is living separate and apart from the offender, when either of the following apply:

* * *

(b) The other person is less than thirteen years of age, whether or not the offender knows the age of such person.

OHIO REVISED CODE SECTION 2907.02(A)(2)

No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.

OHIO REVISED CODE SECTION 2907.05(A)(3)

No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons, to have sexual contact when any of the following apply:

* * *

(3) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows

the age of such person.

OHIO REVISED CODE SECTION 2907.03(A)(5)

No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:

***

(5) The offender is the other person's natural or adoptive parent, or a stepparent, or guardian, custodian, or person in loco parentis.

STATEMENT OF THE CASE AND FACT

During its term commencing October 4, 1988, a Grand Jury for the County of Medina, State of Ohio, indicted petitioner for alleged violations of Ohio Revised Code Sections 2907.02(A)(1)(b) and 2907.02(A)(2), Rape; 2907.05(A)(3), Gross Sexual Imposition; and 2907.03(A)(5), Sexual Battery.

On August 28, 1989, a hearing was held before the Honorable Judith A. Cross, Judge of the Court of Common Pleas, Medina

County, Ohio. The motion hearing was upon the application of the State of Ohio. The State was requesting a court order compelling petitioner to submit to the withdrawal of blood from his body. The State contended that, without evidence, the blood was to be withdrawn for DNA analysis. The analysis was to determine the paternity of a child conceived of the alleged rape. The Court of Common Pleas is currently possessed of the record of this hearing.

In any event, the State produced no evidence as to the efficacy of the procedure desired by the State. In fact, no procedure was presented to the Court. The Court had before it only a determination that the State desired petitioner's blood. The Court, through a Journal Entry (See Appendix "E") granted the State's motion and ordered a blood sample be taken from petitioner for DNA analysis. She further ordered that a separate sample be set aside for petitioner's "own submission or analysis."

On August 30, 1989, the then counsel for petitioner filed a Motion to Stay the Taking of a Blood Sample in the Court of Appeals for the Ninth Judicial District, Medina County, Ohio.

The State of Ohio moved the appellate court to dismiss petitioner's appeal. The appellate court agreed with the State's argument that the trial court's order did not amount to a final appealable order. Petitioner's counsel filed a motion for reconsideration, which was denied by the appellate court on November 28, 1989.

Thereafter, on December 5, 1989, petitioner, through his counsel, filed a Notice of Appeal to the Supreme Court of the State of Ohio alleging the case involved issues of public and general interest as well as involving substantial constitutional questions. The issues were briefed and, on March 18, 1990, the Supreme Court of Ohio, through an entry dated March 18, 1990, refused to certify the record stating that no substantial constitutional question existed.

Petitioner is now before this Honorable Court praying that it review the aforementioned judgments of the courts of the State of Ohio.

STAGE IN THE PROCEEDINGS WHERE THE FEDERAL QUESTIONS WERE RAISED

Since the date of the trial court's order compelling petitioner to submit to a blood test, he has, through his previous counsel, raised objections based upon the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States. At each stage, petitioner's arguments were overruled without opinion, explanation or reference.

ARGUMENT

INTRODUCTION

In the lower courts, counsel for petitioner made arguments concerning the viability of the trial court's order based upon its repugnance to both the Fourth and Fifth Amendments to the Constitution of the United States. In each instance, his arguments were met with silence. For purposes of this petition, the arguments regarding the Fifth Amendment will be left aside.This petition will, on the other hand, explain and amplify the Fourth Amendment arguments.

As a final note, petitioner asserts that, contrary to the finding of the Ninth District Court of Appeals, the trial court's order compelling petitioner to submit to a blood test is a final appealable order. Once blood is drawn, the invasion is complete and irreversible.

FOURTH AMENDMENT ARGUMENT

Petitioner's argument, should this Court accept certiorari in this matter, is very straightforward. A trial court cannot, consistent with the Fourth Amendment, compel a criminal defendant to submit to the withdrawal of his blood, without some evidence before it that indicates analysis of the blood will lead to admissible evidence.

Again, for purposes of this petition, petitioner would point to a single case out of this Court which seems to encompass much of the thought on this area of the law. That is *Winston v. Lee*, 470 U.S. 753, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985).

The facts of *Winston* were that an individual, the defendant therein, armed with a gun, attempted to rob a shopkeeper. Appar-

ently, a shootout ensued between the offender and the shopkeeper, the shopkeeper being a good enough shot to cause a bullet to be lodged in the assailant's left chest area. Some eight blocks from where the shooting occurred, the soon-to-be defendant presented himself to a hospital complaining of a gunshot wound to his chest. The victim was brought to the hospital and identified the patient as his assailant.

Naturally, the prosecution believed that if it could obtain the bullet from the accused's chest, it would, by comparison to the shopkeeper's gun, conclusively establish his presence at the time of the alleged robbery. So, the prosecution filed a motion to compel the defendant to submit to a surgical procedure which would remove the bullet from the accused's chest.

Just as naturally, the defendant resisted this intrusion into his body by the State. As it turned out, the surgical procedure to remove these bullet fragments was more complex than originally put forth by the prosecutor. Eventually, this Court upheld the lower court's decisions enjoining the threatened surgery.

The Court, in an opinion written by Justice Brennan, held that

the contemplated surgery was an unreasonable search and seizure under the Fourth Amendment. The Court reached this holding by applying the balancing test enunciated in *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed. 908 (1966). This test consists of three parts, according to the *Winston* court. They are:

1) Reasonableness. What is the extent to which the contemplated procedure may threaten the safety or health of an individual;

2) The Extent of the Intrusion. What is the extent of intrusion upon which the individual's dignitary interests in personal privacy and bodily integrity; and

3) State's Interest. Has the State demonstrated a compelling interest justifying the intrusion.
Winston v. Lee, 470 U.S. at 761, 765.

It is absolutely essential that this analysis be completed prior to sticking the needle into petitioner's arm. Once the needle has been inserted, the invasion of petitioner's body and the violation of his Fourth Amendment rights are complete. Although not emphatically stated in either the *Winston* or *Schmerber* cases, it is definitely

implied.

In *Schmerber*, this Court stated that:

> The overriding function of the Fourth Amendment is to protect personal privacy and dignity from unwarranted intrusion by the State ...
>
> * * *
>
> The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great. *Schmerber v. California*, 384 U.S. at 767, 770. (emphasis added).

This language was quoted with approval in *Winston v. Lee*, 470 U.S. at 760, 761. To give any import, then, to the proscribed analysis in *Schmerber* and *Winston*, the trial court must conduct this hearing prior to the invasion of the defendant's body. That is exactly what is lacking in the instant case. The hearing through which the trial court ordered petitioner to submit to the blood test consisted of prior counsel's arguments. No evidence was put forth by the State. There was nothing, other than the prosecution's assertions, upon which the trial court could make an "informed, detached and deliberate determination." For example, in *Schmer-*

ber this Court was dealing with an issue similar to the one at bar in that the procedure employed by the State was withdrawal of blood with a needle. However, the *Schmerber* Court was in a position to note that "[e]xtraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol." 384 U.S. at 771. In this case, there is nothing before the court to determine the efficacy of the State's contemplated procedure. Certainly, there was nothing before the trial court which would indicate that DNA testing is anything but the controversial subject it is.

CONCLUSION

Based upon the foregoing, petitioner respectfully requests this Honorable Court to issue a writ of certiorari in this cause.

Respectfully submitted,
MARCO & MARCO, L.P.C.

Richard J. Marco
Attorney for Petitioner
Ohio Atty. No. 0015118
52 Public Square
Medina, Ohio 44255
(216) 725-0030

APPENDIX "A"

Date Filed: May 29, 1990

IN THE SUPREME COURT
FOR THE STATE OF OHIO

STATE OF OHIO	CASE NO. 90-17
Plaintiff-Appellee	
vs.	NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES
RICHARD C. FRAZIER	
Defendant-Appellant	

Now comes defendant-appellant herein, Richard C. Frazier, and hereby gives notice of his intention to appeal this Honorable Court's Judgment Entry dated March 18, 1990, overruling appellant's Motion For Leave to Appeal.

MARCO & MARCO, L.P.C.

/s/ Richard J. Marco
Richard J. Marco
Attorney for
Defendant-Appellant
Ohio Attorney No. 0015118
52 Public Square
Medina, Ohio 44256
(216) 725-0030

CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Appeal was this 25th day of May, 1990, served on Dean Holman, Medina County Prosecuting Attorney, 135 S. Jefferson St., Medina, OH 44256, by regular U.S. mail.

/s/ Richard J. Marco
Richard J. Marco
Attorney for
Defendant-Appellant

APPENDIX "B"

Date Filed: March 18, 1990

IN THE SUPREME COURT OF OHIO

1990 TERM
To wit: March 18, 1990

State of Ohio
Appellee
vs.
RICHARD C. FRAZIER
Appellant

Case No. 90-17
ENTRY

Upon consideration of the motion for leave to appeal from the Court of Appeals for Medina County, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COST:

Motion Fee, Affidavit of Poverty filed.

(Court of Appeals No. 1842)

/s/ Thomas J. Moyer
Thomas J. Moyer
Chief Justice

APPENDIX "C"

Date filed: October 2, 1989

STATE OF OHIO	)	IN THE COURT OF APPEALS
	) SS	NINTH JUDICIAL DISTRICT
COUNTY OF MEDINA	)	
STATE OF OHIO	)	C.A. NO. 1842
	)	
Plaintiff-Appellee	)	
	)	
v.	)	
	)	
RICHARD FRAZIER	)	
	)	
Defendant-Appellant	)	JOURNAL ENTRY

This case was heard upon the motion of appellee, the State of Ohio, to dismiss the within appeal for lack of a final appealable order as defined in R.C. 2505.02. Appellant has not responded.

Upon consideration thereof, the Court finds that appellant, Richard Frazier, is appealing from the trial court's order requiring appellant to provide the trial court with a blood sample for DNA analysis. This order does not affect a substantial right, determine the action or prevent a judgement as required by R.C. 2505.02.

Accordingly, appellee's motion is well taken. Therefore, the appeal is dismissed.

/s/ D.B. Quillin
Judge

/s/ Mary Cacioppo
Judge

Exhibit C

_____
Judge

cc: John J. Dolatowski, Asst. Prosecutor, 135 S. Jefferson St., Medina, OH 44256 for Plantiff

Edmond F. Bowers, Attorney at Law, One Park Centre, Suite 104, Wadsworth, OH 44281 for Defendant

APPENDIX "D"

Date filed: November 28, 1989

STATE OF OHIO	)	IN THE COURT OF APPEALS
	) SS	NINTH JUDICIAL DISTRICT
COUNTY OF MEDINA	)	
STATE OF OHIO	)	C.A. NO. 1842
	)	
Plaintiff-Appellee	)	
	)	
v.	)	
	)	
RICHARD FRAZIER	)	
	)	
Defendant-Appellant	)	JOURNAL ENTRY

This case was heard upon the motion of appellant, Richard Frazier, for leave to file his motion for reconsideration of the journal entry dated October 2, 1989, instanter.

Upon consideration thereof, the Court finds the motion is untimely, however, in the interest of justice, we will grant appellant leave to file his motion for reconsideration.

The journal entry dated October 2, 1989, dismissed appellant's appeal of the trial court's order requiring appellant to submit to a blood sample for DNA testing for lack of a final appealable order.

Appellant bases his ~~motion~~ on the case of State v. Biddings (Oct. 14, 1988), Franklin App. No. 86AP-910, unreported. Unlike Biddings, we are confronted with an objection to the use of the blood sample's results, not with an objection to the mere taking of a blood sample which is in violation of an appellant's religious beliefs; thus appellant's motion for reconsideration is not well taken.

Accordingly, appellant's motion is denied.

/s/ D.B. Quillin
Judge

/s/ Mary Cacioppo
Judge

cc: Mary Ann Kovack, Asst. Prosecutor, 135 S. Jefferson St., Medina, OH 44256 for Plantiff

---

Edmond F. Bowers, Attorney at Law, One Park Centre, Suite 104, Wadsworth, OH 44281 for Defendant

---